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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAR Case 2015-017; Docket No. 2015-0017; Sequence No. 1]

RIN 9000-AN02

**Federal Acquisition Regulation: Combating Trafficking in
Persons-Definition of "Recruitment Fees"**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to provide a definition of "recruitment fees." The FAR policy on combating trafficking in persons prohibits contractors from charging employees recruitment fees, in accordance with the Executive Order entitled "Strengthening Protections Against Trafficking in Persons in Federal Contracts."

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015-017 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-017". Select the link "Comment Now" that corresponds with "FAR Case 2015-017". Follow the instructions on the screen. Please include your name, company name (if any), and "FAR Case 2015-017" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite FAR Case 2015-017: Combating Trafficking in Persons-Definition of "Recruitment Fees" in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAR Case 2015-017.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to add a definition of "recruitment fees" to subpart 22.17, Combating Trafficking in Persons, and the associated clause at 52.222-50.

DoD, GSA, and NASA published a final rule entitled Ending Trafficking in Persons (FAR Case 2013-001) in the Federal Register at 80 FR 4967, on January 29, 2015. That rule, which implemented Executive Order 13627 and title XVII of the National Defense Authorization Act for Fiscal Year 2013, became effective on March 2, 2015. As implemented in that rule, the policy at FAR section 22.1703(a) and in the clause at 52.222-50(b) prohibits contractors, contractor employees, subcontractors, subcontractor employees, and their agents from charging employees recruitment fees.

II. Discussion and Analysis

A. Early Discussion and Analysis.

To provide an opportunity for early input, the Defense Acquisition Regulations Council and the Civilian Agency

Acquisition Council (the Councils) posted on January 28, 2015, at <http://www.acq.osd.mil/dpap/dars/> a draft definition of "recruitment fees," developed by an interagency group of policy experts on human trafficking. Comments were received from four respondents and are available for viewing at that website.

The divergence in public input highlighted the tension between providing a comprehensive definition of the term to maximize worker protections, and of ensuring that the definition does not elicit unintended consequences that interfere with contractor business operations. As a result, while the Council has made some changes to the rule to reflect initial input, it has also included a number of questions that warrant additional input from the public (see Section III).

The Councils made some revisions to the draft definition of "recruitment fees," such as—

- Addressing fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner or timing of their imposition or collection;

- Including charges for testing and training;

- Modifying language to include tips paid as a kickback;

and

- Adding language interpreters or translators.

The Councils did not modify the definition of “employee” because the rationale for this narrower definition was specifically addressed in the Federal Register with the publication of the second interim rule under FAR Case 2005-012, Implementation of Section 3(b) of the Trafficking Victims Reauthorization Act of 2003, published in the Federal Register at 72 FR 46335, 46337, and 46338, on August 17, 2007, and in the final rule published at 74 FR 2741, 2742, and 2743, on January 15, 2009.

The Councils also note that the Department of State Exchange Visitor Program is not subject to the FAR and program fees charged under that program are not considered recruitment fees, as defined in this proposed rule, as was addressed in the preamble to the final rule under FAR Case 2013-001 published in the Federal Register at 80 FR 4971, on January 29, 2015.

B. Issues highlighted for public comments.

The early public comments, while helpful, have raised a number of questions for the FAR drafters as they work to

promulgate a definition that is both effective in reinforcing the prohibition on recruitment fees and understandable and manageable for contractors.

The Councils invite public comment on all aspects of the proposed definition. However, in particular, the Councils request comments on the following questions:

- Are all costs/fees associated with bringing an employee on board properly treated as recruitment fees?
- —Are there any additional charges that should be considered recruitment fees?
- Should the definition of a recruitment fee vary depending on whether the job is a professional high-paying, high-skill job or an unskilled, low-paying job? Is the location of the job a factor?
- Are the boundaries (i.e., limitations) of the proposed definition clear? If not, what changes would make the limitations clearer?
- As a general matter, is the illustrative list of recruitment fees helpful in understanding what costs an employee may not be charged? If not, why not?
- What, if any, of the specifically enumerated fees in the proposed definition should be excluded and why?

- What, if any, of the specifically enumerated fees not included in the proposed definition should be added?

C. Specific elements of the definition.

The Councils especially welcome feedback on the following specific aspects of the proposed rule. For each of the following, please comment on whether addition of the following described language to the illustrative list of recruitment fee would be helpful, unhelpful, or of no impact, and why.

- Submitting applications, making recommendations, recruiting, reserving, committing, soliciting, identifying, considering, interviewing, referring, retaining, transferring, selection, or placing potential job applicants.

- Labor broker services, both one-time and recurring.

- Exit clearances, and security clearances associated with visas.

- Sending, transit and receiving country government-mandated fees, levies, and insurance.

- Pre-employment medical examinations or vaccinations in the sending country.

- Receiving country medical examinations.

- Transportation and subsistence costs while in transit, including, but not limited to, airfare or costs of other modes of international transportation, terminal fees, and travel taxes associated with travel from sending country to receiving country and the return journey at the end of the contract.

- Transportation and subsistence costs from the airport or disembarkation point to the worksite.

- Security deposits and bonds.

- The inclusion of a collateral requirement, such as land deeds, in contracts.

- Contract breach fees.

- An employer's recruiters, agents or attorneys, or other notary or legal fees.

- Insurance.

- Contributions to worker welfare funds or government provided benefits in sending countries required to be paid by supplier.

III. Determinations

Determinations were made in connection with the final rule implementing title XVII (entitled "Ending Trafficking in Government Contracting (ETGCA)") of the National Defense

Authorization Act for Fiscal Year 2013 to apply these statutory regulations. For an explanation of the Council's determinations, see the preamble published in the Federal Register at 80 FR 4967 and 4983-4986, on January 29, 2015. This proposed rule just clarifies the requirements by adding a definition.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This proposed rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect proposed change to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory

Flexibility Act 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The reason for this action is to develop a standard definition of "recruitment fees" in order to clarify how the Government treats this prohibited practice that has been associated with labor trafficking, within the scope of application of the FAR.

The objective of this rule is to clarify the types of charges and fees that contractors, subcontractors, and their employees or agents are prohibited from charging to employees or potential employees, under the Government policy on combating trafficking in persons.

This proposed rule would apply to all entities, whether small or other than small, that are contractors or subcontractors on U.S. Government contracts. In 2014 there were about 350,000 active registrants in the System for Award Management (SAM). DoD, GSA, and NASA estimate approximately half of the registrants (175,000) are small entities that will receive a contract or subcontract in a particular year. However, there would be no actual impact from this rule unless the small entity was planning to charge or allow another entity, acting on their behalf, to charge a recruitment fee to an employee or potential employee. There is no data available to estimate this impact. Further, for the definition of "small business," the Regulatory Flexibility Act refers to the Small Business

Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 USC 601(3) and 15 USC 632(a)). The SBA regulations at 13 CFR 121.105(a)(1) discuss who is a small business: "Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." So, this initial regulatory flexibility analysis does not need to address impact on foreign small entities with Government contracts or subcontracts that are not small businesses as defined by the Small Business Act.

There are no reporting or recordkeeping requirements associated with this rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There were no significant alternatives identified that would meet the objective of the rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD,

GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2015-017), in correspondence.

VI. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: May 5, 2016.

William F. Clark,
Director,
Office of Government-wide

Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA and NASA propose amending 48 CFR parts 22 and 52 as set forth below:

1. The authority citation for 48 CFR parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

2. Amend section 22.1702 by adding, in alphabetical order, the definition "Recruitment fees" to read as follows:

22.1702 Definitions.

* * * * *

Recruitment fees means the following:

(1) Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner of their imposition or collection—

(i) For soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, testing, training, providing new-hire orientation, recommending, or placing employees or potential employees;

(ii) For covering the cost, in whole or in part, of advertising;

(iii) For any activity related to obtaining permanent or temporary labor certification;

(iv) For processing petitions;

(v) For visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;

(vi) For government-mandated costs such as border crossing fees;

(vii) For procuring photographs and identity documentation, including any nongovernmental passport fees;

(viii) Charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications;

(ix) For an employer's recruiters, agents or attorneys, or other notary or legal fees; and

(x) For language interpreters or translators.

(2) Any fee, charge, cost, or assessment may be a recruitment fee regardless of whether the payment is in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-

kind payment, free labor, tip, or tribute, remitted in connection with recruitment, or collected by an employer or a third party, including, but not limited to—

- (i) Agents;
- (ii) Recruiters;
- (iii) Staffing firms (including private employment and placement firms);
- (iv) Subsidiaries/affiliates of the employer;
- (v) Any agent or employee of such entities; and
- (vi) Subcontractors at all tiers.

* * * * *

3. Amend section 22.1703 by—

- a. Revising paragraph (a) (5) (i); and
- b. Removing from paragraph (a) (6) the word “employees” and adding “employees or potential employees” in its place.

The revisions read as follows:

22.1703 Policy.

* * * * *

(a) * * *

(5) (i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee,

basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.212-5 by—

a. Revising the date of the clause and paragraphs

(b) (33) (i) and (e) (1) (xi) (A); and

b. In alternate II, revising the date and paragraph

(e) (1) (ii) (J) (1).

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE

ORDERS—COMMERCIAL ITEMS (**DATE**)

* * * * *

(b) * * *

___ (33) (i) 52.222-50, Combating Trafficking in
Persons (**DATE**) (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

(e) (1) * * *

(xi) * * *

___(A) 52.222-50, Combating Trafficking in Persons
(**DATE**) (22 U.S.C. chapter 78 and E.O 13627).

* * * * *

Alternate II (**DATE**). * * *

* * * * *

(e) (1) * * *

(ii) * * *

(J) ___(1) 52.222-50, Combating Trafficking in
Persons (**DATE**) (22 U.S.C. chapter 78 and E.O 13627).

* * * * *

5. Amend section 52.213-4 by revising the date of the
clause and paragraphs (a) (2) (viii) and (b) (1) (viii) (A) to
read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions
(Other Than Commercial Items).**

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) (DATE)

(a) * * *

(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items
(DATE).

* * * * *

(b) * * *

(1) * * *

(viii) (A) 52.222-50, Combating Trafficking in Persons
(DATE) (22 U.S.C. chapter 78 and E.O 13627) (Applies to all
solicitations and contracts).

* * * * *

6. Amend section 52.222-50 by—

a. Revising the date of the clause;

b. Adding to paragraph (a), in alphabetical order, the definition "Recruitment fees";

c. Revising paragraph (b) (5) (i);

d. Removing from paragraph (b) (6) the word "employees" and adding "employees or potential employees" in its place; and

e. Removing from paragraph (h) (3) (iii) the word "employee," and adding "employee or potential employee," in its place.

The revisions and addition read as follows:

52.222-50 Combating Trafficking in Persons.

* * * * *

COMBATING TRAFFICKING IN PERSONS (**DATE**)

(a) * * *

Recruitment fees means the following:

(1) Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner of their imposition or collection—

(i) For soliciting, identifying, considering, interviewing, referring, retaining, transferring,

selecting, testing, training, providing new-hire orientation, recommending, or placing employees or potential employees;

(ii) For covering the cost, in whole or in part, of advertising;

(iii) For any activity related to obtaining permanent or temporary labor certification;

(iv) For processing petitions;

(v) For visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;

(vi) For government-mandated costs such as border crossing fees;

(vii) For procuring photographs and identity documentation, including any nongovernmental passport fees;

(viii) Charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications;

(ix) For an employer's recruiters, agents or attorneys, or other notary or legal fees, and

(x) For language interpreters or translators.

(2) Any fee, charge, cost, or assessment may be a recruitment fee regardless of whether the payment is in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute, remitted in connection with recruitment, or collected by an employer or a third party, including, but not limited to—

(i) Agents;

(ii) Recruiters;

(iii) Staffing firms (including private employment and placement firms);

(iv) Subsidiaries/affiliates of the employer;

(v) Any agent or employee of such entities; and

(vi) Subcontractors at all tiers.

* * * * *

(b) * * *

(5)(i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language understood by the employee or potential employee, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee or potential employee, and, if applicable, the hazardous nature of the work;

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7. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(1)(x)(A) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (**DATE**)

* * * * *

(c)(1) * * *

(x)(A) 52.222-50, Combating Trafficking in Persons (**DATE**) (22 U.S.C. chapter 78 and E.O. 13627).

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